DOCKET NO. HHB-CV-19-6056021	:	**SUPERIOR COURT**
	:	
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES	:	**JUDICIAL DISTRICT OF NEW BRITAIN ADMINISTRATIVE APPEALS**
VS.	:	**SESSION**
	:	
EDGE FITNESS, ET AL	:	**JULY 23, 2020**

MEMORANDUM OF DECISION

INTRODUCTION:

This is an administrative appeal by the Commission on Human Rights and Opportunities (CHRO) appealing the final decision of its own hearing officer which concluded that Edge Fitness LLC (Edge Fitness) and Club Fitness (Club Fitness) did not violate General Statutes § 46a-64, by providing a separate women only work out area in their fitness facilities.

FACTS AND PROCEDURAL HISTORY:

Two complainants, Alex Chaplin (Chaplin) and Daniel Brelsford (Brelsford) filed complaints with the CHRO against Club Fitness and Edge fitness respectively, alleging that the provision of a women only work out area in their fitness facilities violated General Statutes § 46a-64 (a), our anti-discrimination in public accommodations statute. The legal issue presented in both complaints was the same, namely whether a commercial co-ed fitness facility can offer a

women only work out area within the larger facility,[1] without violating § 46a-64 (a). The facts in both situations were also materially similar, therefore the matters were consolidated for trial before a hearing officer within the CHRO's Office of Public Hearings.

The record contains evidence of the following: Chaplin and Brelsford were members of Club Fitness and Edge Fitness respectively[2]. Both are male and both used the larger co-ed work out area in their respective facilities. In comparison to the women only area, the larger general work out areas contain larger numbers of each type of equipment. Although, the fitness industry was male dominated until relatively recently, in the 1990's each fitness facility began offering a women only work out area in response to a perceived need. Business with women increased after the women only workout areas began to be offered. A large portion of the business each facility does with women will be lost if the facilities discontinue women only work out areas. The women only area is separated from the rest of the facility, such that people outside the designated area cannot easily look inside, providing privacy for the women inside. The women only areas are used by certain Jewish and Muslim women who are forbidden by their religious beliefs from exercising with men. Expert testimony was offered indicating that (i) more than 60 percent of

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[1] The women only work out area is small, comprising only about 5 percent of the overall facility and only contains equipment that can also be found in the general work out area. Women are free to use the larger general work out area as well.

[2] The men apparently complained because they were slightly delayed in using some equipment in the main workout area while other members used the equipment. Neither complainant has appeared in this appeal.

women customers would cancel their memberships if the women only areas were abolished; (ii) women prefer these separate areas for gender privacy reasons and for a sense of safety; (iii) women prefer these separate areas in order to minimize degrading feelings of sexual objectification and body shame, all feelings which are disproportionately felt by women; and (iv) elimination of the separate areas would be harmful to women's health. Both complainant men felt discriminated against by the very existence of the separate women only areas.

The CHRO specifically represented Chaplin and Brelsford in this matter, but also generally represents the interests of the people of Connecticut in matters of improper discrimination. The CHRO is aggrieved because it represents the individual defendants, has exhausted its administrative remedies, and appeals an adverse final decision of its hearing officer finding that the provision of a women only work out area in defendants' fitness facilities did not violate General Statutes § 46a-64 (a).

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.[3] Judicial review of an administrative decision in an appeal under the

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[3] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law;

UAPA is limited. *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

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(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings."

ANALYSIS:

I. Antidiscrimination in Public Accommodations

General Statutes § 46a-64 provides in pertinent part:

> (a) It shall be a discriminatory practice in violation of this section: (1) To **deny any person** within the jurisdiction of this state **full and equal accommodations** in any place of **public accommodation,** resort or amusement **because of** race, creed, color, national origin, ancestry**, sex,** gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran, of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons; (2) **to discriminate, segregate or separate on account of** race, creed, color, national origin, ancestry**, sex,** gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran; ...
> (b)(1) **The provisions of this section with respect to the prohibition of sex discrimination shall not apply to** (A) the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex or (B) **separate bathrooms or locker rooms based on sex.**

There is no argument, and it is established, that the fitness facilities of both defendants are places of public accommodation. Thus, in this matter General Statutes § 46a-64 establishes the elements of a claim of illegal public accommodation discrimination as (i) an establishment of public accommodation, (ii) has denied the complainants full and equal accommodations or

segregated the complainants, (iii) on the basis of the complainants' sex, unless such denial or segregation falls within an exception such as the exceptions provided for in General Statutes § 46a-64 (b) (1).

Antidiscrimination statutes are remedial in nature, and as a result exceptions to their sweeping antidiscrimination provisions are narrowly construed. Said another way, although certain discrimination may statutorily be allowable under certain circumstances, the overwhelming purpose is to eliminate discrimination based upon the protected categories specified in the statute. That being said, our legislature in enacting General Statutes § 46a-64 (b) (1) specifically recognized that gender privacy interests should prevail over the overarching sex based antidiscrimination provisions in the areas of separate sex bathrooms and locker rooms.[4] Thus, the legislature has determined that, in recognition of existing gender privacy interests, it is permissible to discriminate in public accommodations based on sex by providing separate bathrooms and locker rooms for men and women. Accordingly, in these instances the legislature found that gender privacy interests were more important than promoting blanket antidiscrimination based on sex in these areas.

It is also clear that in establishing the General Statutes § 46a-64 (b) (1) exceptions, which apply only to discrimination based on sex, the legislature has viewed discrimination based on sex as different from discrimination based on other specified categories. Whereas there are permitted

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[4] Some forms of gender discrimination are rational and do not offend when such gender discrimination is based on legitimate privacy concerns. See *Albright* v. *Southern Trace Country Club, Inc.* 879 So. 2d 121, 136-138 (La. 2004).

statutory exceptions to sex based discrimination, there are no statutory exceptions to discrimination based upon race, color, or national origin. Thus, for discrimination based on sex, the legislature has determined that other interests may supersede general antidiscrimination prohibitions in certain circumstances. Accordingly, discrimination based on sex in the provision of separate bathrooms or locker rooms is acceptable, however, discrimination based on race is essentially never acceptable.

Discrimination and separation based on gender under appropriate circumstances has been found by courts to not violate equal protection and/or federal and state laws implementing equal protection requirements. The United States Supreme Court has stated that "in certain narrow circumstances men and women are not similarly situated; in these circumstances a gender classification based on clear differences between the sexes is not invidious . . . ." (Emphasis altered.) *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, 478, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981). Accordingly, equal protection claims based on gender discrimination are reviewed using an intermediate standard which requires an important interest that the policy in question supports. See *Craig* v. *Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). Legitimate gender privacy concerns are such an "important interest". In fact, gender privacy is not merely an interest, it is a right. The U.S. Court of Appeals for the Second Circuit has stated that, "there is a right to privacy in one's unclothed or partially unclothed body, regardless [of] whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment." See *Poe* v. *Leonard*, 282 F. 3d 123, 138-39 (2d Cir. 2002). The U.S. Court of Appeals for the Ninth Circuit similarly stated that "[t]he desire to shield one's unclothed figure

from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." See *York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963). Further, the U.S. Court of Appeals for the Third Circuit has found that an individual has a protected privacy interest in his or her partially clothed body particularly while in the presence of members of the opposite sex. See *Doe* v. *Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011). Here the uncontroverted testimony established that women exercise in form fitting revealing clothing and assume exercise positions that can reasonably be understood to be revealing and embarrassing, particularly in the presence of strangers of the opposite sex, thereby giving rise to legitimate gender privacy interests and rights.

It is clear that a women only exercise area is not a bathroom or a locker room and there is no record evidence to indicate otherwise. The question then is, does General Statutes § 46a-64 (b) (1) allow for exceptions to the sex based antidiscrimination prohibitions in cases other than bathrooms or locker rooms where the same gender privacy interests that allowed for the exceptions for bathrooms and locker rooms are in play. Said another way, the statute expressly excepts bathrooms and locker rooms from sex based antidiscrimination prohibitions, but what does the statute provide for in similar cases such as work out areas, showers, dressing rooms, and hospital rooms? Thus, unless the statute is read to include a gender privacy exception similar to the express exception for bathrooms and locker rooms, it would be a violation to provide separate showers, dressing rooms and hospital rooms for men and women in public accommodations. The court notes that common experience provides that the provision of separate showers, dressing rooms and hospital rooms for men and women has historically been

essentially universal. Further, these separate women only work out areas have been provided now for decades[5].

"When construing a statute, [a court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [the court] seek[s] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, General Statutes § 1-2z directs [the court] first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . [S]tatutory language does not become ambiguous merely because the parties contend for different meanings." (Internal quotation marks omitted.) *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 141-42, 176 A.3d 1146 (2018). However, it is also well established that courts should, whenever possible, construe statues to avoid constitutional infirmities. See *Foley* v. *State Elections Enforcement Commission*, 297 Conn. 764, 779-80, 2 A.3d 823 (2010).

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[5] The explicit exceptions for both bathrooms and locker rooms were enacted in 1994. However, the provision of separate showers, dressing rooms, hospital rooms and physical fitness workout areas both predate and postdate the enaction of specific exceptions for bathrooms and locker rooms.

In this matter, interpretation of the statute starts with the words of the statute itself and considers the following factors: (i) the fact that the legislature recognized and addressed the existence and importance of gender privacy in connection with the sex based antidiscrimination provisions in the public accommodations statute by expressly exempting bathrooms and locker rooms; (ii) the fact that the legislature did not expressly include workout areas as an exception; (iii) the initial primary objective of the legislature in prohibiting sex based discrimination was to protect women in view of historical discrimination; (iv) the legislature's recognition that some interests such as gender privacy can be more important than sex based antidiscrimination in some instances; and (v) religious beliefs and freedoms also enter into the considerations of whether women only work out areas may be provided. Further, the uncontroverted evidence in this matter, and general common experience indicates (i) that women experience, to a greater extent than men, and can be injured by, thoughts of sexual objectification and body shame; (ii) exercising requires people to move and pose in ways that increase the possibility of sexual objectification and body shame, particularly for women; (iii) sincere gender privacy interests are reflected in and supported by an increase in business, with women, when offering segregated women only workout areas; and (iv) Muslim women and certain Jewish women are religiously prohibited from exercising with men.

The uncontroverted evidence in the record, which is supported by common experience, is that if the women only work out areas were eliminated, and women were deprived of the choice to exercise without men present, women would suffer from sexual objectification, extreme

embarrassment, anxiety, stress, and many would choose not to exercise in public accommodations. The foregoing conclusions were supported by uncontroverted fact testimony as well as expert testimony.[6] Exercising requires people to move and pose in ways that increase the possibility of sexual objectification[7] and body shame, particularly for women.[8] Thus, it appears that the gender privacy interest here is on par with the same interest that caused the legislature to specifically exempt bathrooms and locker rooms.[9]

Although the sex based antidiscrimination provisions are bi-lateral, in that they protect both sexes equally, these provisions were originally included, to a large extent, to protect women and to correct historical discrimination patterns against women. Civil rights laws exist for the vindication and protection of human dignity. See *Heart of Atlanta Motel Inc.* v. U.S., 379 U.S. 241, 90 S. Ct. 1099, 25 L. Ed. 2d 275 (1964). Thus, in interpreting and enforcing these statutes, we must ensure that we seek to be true to the overall goals. With that in mind, it would be

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[6] See the testimonies of Dr. Dianne Quinn, Laura Altieri, Frank Rinaldi, and Mr. Sansone. The uncontroverted testimony was further backed up by surveys of members who also provided their views.

[7] The Supreme Court in the case of *Griswold* v. *Connecticut,*381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), recognized that having one's body inspected by members of the opposite sex may invade the individual's most fundamental right, the right of privacy of one's own body.

[8] The unwanted mixing of men and women in situations where women are moving and posing in ways that increase the likelihood of sexual objectification, can increase the incidence of inappropriate behavior, such as sexual harassment.

[9] When the legislature added General Statutes § 46a-64 (b) (1) (B) as an exception to the sex based antidiscrimination provisions of the statute in 1994, they specifically discussed the allowance of modesty in appropriate situations.

unusual to interpret and enforce a statute in a manner that injures women, when the statute's primary goals are the preservation of human dignity, the protection of women, and the correction of historical discrimination against women. That being said, the court also recognizes that discrimination itself injures society, however, the legislature, as noted, has allowed for limited exceptions in the pursuit of more important interests in certain circumstances.

a. Right to Freedom of Religion

In addition to the protection of gender privacy interests, the women only work out areas also impact our right to freedom of religion. As noted, the uncontroverted evidence, as supported by common experience, indicates that women of certain faiths, such as Islam and certain sects of Judaism, are prohibited from exercising with men. Thus, unless women only exercise areas are maintained, women of these faiths will not have an equal opportunity to exercise in these public accommodations. General Statutes § 52-571b codifies Connecticut's constitutional right to freedom of religion as provided for in section three of the first article of our Constitution. General Statutes § 52-571b provides in relevant part:

> (a) The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling

governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

Here, the elimination of women only exercise areas will disparately impact women of Islamic and Judaic faiths and will burden their ability to exercise in public accommodations. Although this result would be in furtherance of broad antidiscrimination prohibitions, there are exceptions to those prohibitions, as noted above, and the record does not reflect that elimination of women only exercise areas would be the least restrictive means of accomplishing a compelling government interest. Thus, we have a potential clash of rights in eliminating discrimination without unduly burdening freedom of religion.

b. Conclusion

Upon considering all of the factors noted above, namely (i) the legislature's recognition of a gender privacy interest as an exception to the sex based antidiscrimination provisions; (ii) the protection of women in a manner consistent with the overall goal of the sex based antidiscrimination statute; (iii) preservation of freedom of religion interests; (iv) avoidance of a clash with constitutional and statutory freedom of religion rights; and (v) the promotion of safety and avoidance of inappropriate behavior, the court concludes that the provision of women only exercise areas in fitness centers of public accommodation does not violate the sex based antidiscrimination provisions of General Statutes § 46a-64.

II. Bonafide Occupational Qualification

The defendants argued, and the hearing officer found, that similar to a bona fide occupational qualification, there was a customer gender privacy defense to sex discrimination in public accommodations. The court respectfully disagrees that a bona fide occupational qualification defense exists in our anti-discrimination in public accommodations statute. A bona fide occupational qualification is a defense to certain discrimination in the employment context. The principle allows for the hiring of one sex in preference to the other sex if the position requires one particular sex as an essential qualification of the position, such as hiring only women for the position of modeling women's clothing. This concept has no application in the present case. Further, there are no circumstances where pure business interests or customer preferences alone can be used to justify sex based discrimination. We cannot allow customer preferences or prejudices, or purely business interests based on those customer preferences alone, to justify discrimination.[10] These concepts have no anchor in our public accommodation anti-discrimination statute, however legitimate gender privacy interests do have such an anchor.

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[10] As noted above, the business interests and the customer preferences are evidentiary reflections of the sincerity of the gender privacy concerns at issue in this matter. That being said, it is not possible to justify discrimination based on protected categories simply because it is good for business or customers seek it.

III. Specificity of the Pleadings

The CHRO complains that one of the defendants did not specifically plead a special defense of customer gender privacy and that neither defendant specifically pled religious accommodation. First, these matters were consolidated and tried as one matter. Second, the formal requirements of pleading do not apply in administrative proceedings, particularly proceedings before the CHRO. Third, these two issues were in fact specifically raised at the hearing, tried, and reflected in the hearing officer's decision. Fourth, issues such as the appropriateness of pleadings and evidentiary rulings in an administrative process are reviewed on appeal based on an abuse of discretion basis. Fifth, the issue presented in this matter is an important issue that has ramifications beyond the parties hereto. As a result, it would be inappropriate to allow the decision to turn upon a formality such as the pleadings, particularly since the plaintiff agency was clearly aware of these issues and tried and briefed the issues before the hearing officer.[11] Lastly, issues such as gender privacy and religious rights are legal principles that are naturally intertwined with a defense against the discrimination alleged. In view of the foregoing, the court finds that no reversible error exists in the hearing officer's

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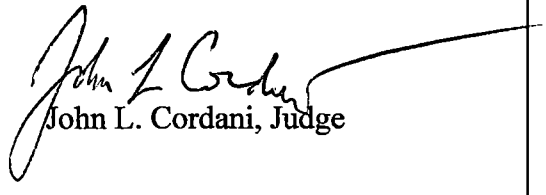
[11] The CHRO was fully aware that Club Fitness had specifically pled the gender privacy defense in this consolidated matter. Clearly in this consolidated matter the defense could not be applied to one defendant and not the other. Further, the CHRO did not properly object to the evidence that was introduced concerning this defense and was not prejudiced in that the CHRO had a full opportunity to cross examine and to introduce counter evidence if it so chose.

consideration of gender privacy and religious rights in connection with this matter and the hearing officer's corresponding evidentiary rulings.

ORDER:

The court concludes that on appeal the plaintiff has failed to establish that the hearing officer's decision was (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The court further concludes that, based on the record of this matter, the provision of women only exercise areas in fitness centers of public accommodation by these defendants does not violate the sex based antidiscrimination provisions of General Statutes § 46a-64. The appeal is dismissed.



John L. Cordani, Judge